



**Comments of the Alliance for Digital Innovation on the
Department's Implementation of Section 3610 of the CARES Act**

Dear Sirs:

On behalf of the Alliance for Digital Innovation (ADI), we appreciate the chance to comment upon the Department of Defense's (DoD) implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.¹

ADI is a coalition of innovative, commercial companies whose mission is to bring IT modernization and emerging technologies to government. Our members include many of the country's largest, cloud-forward firms, in addition to many other small and medium sized cybersecurity, artificial intelligence, and professional services companies.² ADI's mission is to engage with public sector thought leaders to share emerging commercial technologies and to advocate for the removal of institutional and bureaucratic barriers to the adoption by the warfighter of the latest technologies and capabilities to meet mission outcomes.

It is our view that DOD must capitalize on modern technological advances in the most agile, safe, and efficient manner possible. As Adopting new tools is a national security imperative. Failure by DOD to modernize not only wastes American taxpayer dollars and impairs the warfighter, but creates significant risks to national security in the form of increased likelihood of cyberattacks and the potential for critical IT system failures.

1. DOD must address broader issues arising from telework and remote collaboration as a new working paradigm arises for the DOD and contractor workforce

We begin our comments by noting that we must first address the broader challenge revealed by this crisis. The current pandemic crisis has exposed fundamental weaknesses in the current DOD legacy infrastructure. Systemic issues with widespread over classification of information; creation of unnecessary bureaucratic constraints on collaboration; and capacity issues with existing telecommunications systems all require a long-term policy response from DOD – well beyond the particulars of implementing Section 3610 of the CARES Act.

Fixing this situation is essential to our national security. In a [multi-trade association letter](#) sent to leadership offices in both House of Congress and the White House on April 15, 2020, these issues were explicitly raised. The letter outlined four key “pillars” to address these problems, which we commend to DOD:

1. Provide adequate funds to modernize IT systems used by agencies working on the

¹ Coronavirus Aid, Relief, and Economic Security Act (CARES Act), (pub.L.No.116-136) was enacted on March 27, 2020 in response to the COVID-19 national emergency.

² See <https://alliance4digitalinnovation.org/about/membership/>

front lines of this pandemic and future emergency responses. Such funding should be made available for expenditure over multiple years;

2. Establish and fund a mechanism that provides federal financial support to state and local government agencies in need of IT modernization and upgrades that, in turn, will enhance the speed and effect of relief efforts for citizens, business, hospitals, and organizations in direct need during the COVID-19 and subsequent emergencies;
3. Support the Technology Modernization Fund (TMF) at an appropriations level that would allow for meaningful investment in cross-agency IT modernization initiatives; and
4. Ensure that IT modernization efforts include focused attention and investment on strengthening cybersecurity, workforce training, and process transformation.³

While clarifying the applicability and role of Section 3610 in addressing the immediate crises, DOD must not lose sight of the broader policy challenges arising from this pandemic emergency.

2. Feedback on the Implementation of Section 3610

In its May 7, 2020 memorandum,⁴ the Defense Pricing and Contracting (DPC) noted that “in coming weeks, DPC will leverage internal coordination teams to produce a draft DoD Process for 3610 Reimbursements for industry partner review. After consideration of industry input, DPC plans to release the final policy before the end of May. The goal is to establish an efficient process to handle claims, e.g.-corporate or division consolidated submissions as appropriate.”

We appreciate this call for industry participation in COVID-19 contracting procedures. Needless to say, ADI believes that the current pandemic crisis is a grave threat to achieving the DOD mission. As the Office of Management and Budget (OMB) noted in Memorandum M-20-18 “Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19),”⁵ federal contractors play a vital role in helping agencies meet the needs of our citizens, including the critical response efforts to COVID-19. The memo notes:

“Achieving these important goals - and maintaining the resilience of our Federal contracting base - requires continued communication by agencies with their contractors, both small and large, and effective leveraging of flexibilities and authorities to help minimize work disruption.”

To support this policy, DOD has moved forward with commendable speed to define the implementation of Section 3610 to the CARES Act. Section 3610 is intended to maintain workers in a “ready state” in those circumstances where workers cannot access government or contractor facilities due to pandemic restrictions. Its purpose is to maintain the defense

³ Multi-Association Letter on IT Modernization Priorities, April 15, 2020, *attached*.

⁴ Defense Pricing and Contracting (DPC) COVID-19 Guidance Provided for the Contracting Community, para 28, citing the May 1, 2020 DPC guidance memo.

⁵ OMB Guidance M-20-18 (March 20, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf>.

industrial base workforce pending a successful response to curtail the pandemic.⁶

A. Comments on the DPC Guidance documents dated May 18, 2020

On May 18, 2020, DPC issued the latest Guidance Documents consisting of its draft (1) overarching guidance for Section 3610 of the CARES Act; (2) a reimbursement checklist, and (3) instructions for the reimbursement checklist.

Key attributes of these latest Guidance documents include:

- Clarification that contractors need to engage with Contracting Officers to ascertain whether they qualify for reimbursement as an “Affected Contractor”. ***We applaud the level of detail regarding the specific inquiries and underlying documentation standards to support this determination, as well as the clarification that a formal “Determination and Findings” will not be required in making this determination.***
- Clarification that the guidelines will also inform requests for reimbursement for non-FAR contracts, such as Other Transaction Authorities (OTAs). ***OTAs are a key source of agile and innovative acquisition programs, and maintaining their flexibility and availability is something we strongly support.***
- Clarification regarding the “availability of funds” requirement for Section 3610 reimbursements. The new guidance clarifies that funds available for use need not be funded with only CARES Act funding. We remain concerned, however that the appropriations committees may (as they have in the past), unduly restrict these reprogramming activities in a fashion that obstructs the flexibility of funding reassignments for Section 3610 relief. ***We are happy to collaborate with DoD as an industry group to engage the appropriations staff to explain the value flexibilities in this regard.***
- Clarification of Section 3610 reimbursement for subcontractors and third parties. Asking prime contractors to obtain the same level of justification and underlying documentation from its subcontractors seeking Section 3610 reimbursement is helpful. However, we are concerned that many subcontractors may not necessarily have the same FAS-compliant accounting systems as large prime contractors. ***We urge DoD to advise the Defense Contract Audit Agency (DCAA) and Defense Contract Management Agency (DCMA) to exercise flexibility when reviewing sponsored claims from primes on behalf of their subcontractors regarding the level and scope of documentation for small subcontractors who do not fall under TINA or who otherwise lack FAS-based accounting systems. Operationally, it may be more flexible for DCAA and DCMA offer to work directly with impacted subcontractors to establish “affected contractor” status and eligibility claims rather than require prime contractors to serve as an intermediary.***

⁶ Section 3610 accomplishes this by creating a new rule under the Cost Accounting Standards allowing contractors to seek reimbursement for the labor hours of workers unable to access government.” As the impact of COVID-19 continues to evolve, many Federal government contractors that ordinarily work side-by-side with the Federal workforce may currently be unable to access their Federal work sites as a result of building closures, quarantines or implementation of social distancing practices. Agencies are urged to work with their contractors, if they haven't already, to evaluate and maximize telework for contractor employees, wherever possible. Telework is an important tool for enabling continued contract performance in a manner that can meet health and safety guidelines from the CDC and State and local public health authorities.” Id.

- Clarification of direct versus indirect cost pools for Section 3610 reimbursement. Many of our members have had questions regarding the treatment of direct versus indirect labor pools, forward pricing considerations and proper treatment of costs under T&M contracts. ***This guidance goes a long way to clarify these issues; however specific questions continue to be raised. We urge DoD to establish an Ombudsman office to arbitrate and respond to these questions.***

We are heartened by DoD's issuance of these helpful guidelines and look forward to continued collaboration as these guidelines evolve over time. ⁷

B. We recommend creation of an Ombudsman to work with small contractors on issues regarding Section 3610

OMB and DOD guidance stresses the need for agencies and DOD customers to work cooperatively with their contractors to ensure maximum flexibility in sustaining the contracting workforce in a ready state moving forward. OMB Memorandum M-20-18 states expressly that agencies should be flexible in this regard, including specifically in providing extensions to performance dates if telework or other flexible work solutions, such as virtual work environments, are not possible, or if a contractor is unable to perform in a timely manner due to quarantining, social distancing, or other COVID-19 related interruptions.⁸

The concern of many innovative nontraditional contractors is that this aspirational OMB guidance may not be accepted by the audit agencies undertaking incurred cost audits in the future. These auditors will be far removed from the urgency of the pandemic crisis and, as a result, considerations and flexibilities accepted by the contracting officer at the point in time of crisis contract management may not be honored by DCAA or DCMA in retrospect.

As a result, as we previously mentioned, DoD should establish an Ombudsman to assist smaller, nontraditional contractors in their dealings in the future with DCAA and DCMA.

C. Expand Section 3610 guidance to make permanent the full scope of Stafford Act emergency procurement authorities to better management acquisition agility

As noted by OMB M-20-18, agencies are “encouraged to leverage the special emergency procurement authorities authorized in connection with the President's emergency declaration under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (the “Stafford Act”). In particular, ***these flexibilities include increases to the micro-purchase threshold, the simplified acquisition threshold, and the threshold for using simplified procedures for certain commercial items, all of which are designed to reduce friction for contractors, especially small businesses, and the government and enable more rapid response to the many pressing demands agencies face.***

⁷ Aspects of the issued guidance documents still however vary between the Military Departments (MILDEPS) and Fourth Estate. DOD should require that agencies issuing Section 3610 FAQ's coordinate the answers with the Defense Pricing Agency (DPA) *prior to issuance to industry*, so as to harmonize all COVID-19 and Section 3610 guidance on an enterprise-wide basis throughout the MILDEPS to eliminate (or at least explain) the basis for these differences.

⁸ OMB M-20-18.

We acknowledge that use of these flexibilities does not mean they will always be suitable, and “agencies should exercise sound fiscal prudence to maximize value for each taxpayer dollar spent. At the same time, *the acquisition workforce should feel fully empowered to use the acquisition flexibilities, as needed, consistent with good business judgment in response to this national emergency.*”⁹

ADI believes that the importance and value of these emergency procurement measures should be made permanent to accurately reflect the agility and flexibility of the acquisition system following the COVID-19 crisis. Government will continue to need these authorities to enable vendor management flexibility, improve performance, and effective track costs and outcomes.

Conclusion

Thank you for the opportunity to comment upon the CARES Act guidance and implementation of Section 3610. **As DOD continues its implementation of Section 3610, ADI respectfully requests that we be invited to participate in any phone calls, webinars, or other for a made available to industry, so that we may offer continued feedback on behalf of our membership.** You may contact me at mcornelius@alliance4digitalinnovation.org to coordinate any logistics regarding this request.

We appreciate the transparency and collaboration with our DOD partners to address this unprecedented pandemic.

Very Truly Yours:



Matthew Cornelius

Executive Director

Attachments:

Multi-association Letter

⁹ OMB M-20-18.